No. 359

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,
Plaintiff in Error,

vs.

S. Prentiss Smith, Frank Miller and William P. Harrington, Executors of the Last Will and Testament of Edgar Mills, Deceased,
Defendants in Error.

Brief on Behalf of Plaintiff in Error.

SYDNEY V. SMITH,
VINCENT NEALE,
Attorneys for Plaintiff in Error.

Writ of Error to the Circuit Court of the United States, for the Ninth Judicial Circuit, in and for the Northern District of California.

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ALBERT E. GRAY, *Plaintiff,* vs. S. PRENTISS SMITH, FRANK MILLER and WILLIAM P. HARRINGTON, Executors of the Last Will and Testament of Edgar Mills, Deceased, *Defendants.*	No. 11,878.

Brief on Behalf of Plaintiff in Error.

Vendor and Purchaser — Action for Damages for Breach of Contract by Purchaser of Real Estate—Ready, Able and Willing—When a Necessary Plea—Burden of Proof.

Statement of the Case.

On October 7th, 1891, Mills, the defendants' testator, and Gray, the plaintiff, agreed in writing that Mills should buy from Gray a lot on Market street in San Francisco for $235,000, and that Mills should pay therefor $120,000 in cash, and the balance by a conveyance by Mills to Gray of lands in Colusa and Tehama Counties valued by Mills at $115,000.

During the negotiations with Mills, Gray had not then yet acquired title to the Market street lot, which was the property of one Joseph Donohoe. Before closing with

Mills, however, Gray (through one Cavanagh) obtained an agreement from Donohoe for the purchase of the lot at $165,000, showing a profit to Gray, therefore, of $70,000, namely, the difference between $165,000 and $235,000, as above. This agreement was taken as running to Mills direct, as Cavanagh's nominee. Prior to delivery and acceptance of abstract, Mills was made aware of all the circumstances attending the sale, including the fact that the legal estate was still in Donohoe, and that a profit of $70,000 was coming to Gray out of the transaction. A copy of the Donohoe document accompanied the abstract, thus bringing the abstract of title down and complete to that date.

See the letter from Mills' attorneys, Jarboe & Jarboe, wherein they refer to this document. See also Jarboe's testimony. (Transcript, pages 34, 38.)

Mills accepted the abstract and submitted it to his attorneys. At no time prior to action did Mills or his attorneys make any complaint, or suggestion even, of *mala fides* on Gray's part, or that there was any doubt whatever of his not being "ready, able or willing," at the proper time, to give effect to and to carry out his agreement.

After a lapse of some time, however, Mills' attorneys made an objection on an alleged specific defect in title, and subsequently gave notice to plaintiff, on behalf of their client, that this defect in title was fatal and that Mills unqualifiedly refused to proceed with the purchase. This was the "breach," and the *only* reason given therefor.

In the Court below the title was proved to be good ; the objection to title raised by Mills' attorney was declared to be not well taken, and the breach and renunciation of the contract by Mills was held to be without excuse. This, then, practically was the whole point in contention, and decided in favor of plaintiff. The Court, however, held that the plaintiff must lose, notwithstanding this finding, because he failed to show that he had the ability to perform, or, as the Court expressed it, the "independent ability" to perform, apart from any benefit to be derived on completion through the purchase money and land exchange coming to him from Mills on completion.

We contend that the plaintiff not only won on the merits, but that the Court erred in ruling that the plaintiff must show "independent ability," or indeed (time of performance not being due at the date of breach) any ability whatever. We propose to show that a "breach of contract by one party *before* time of performance is due" not only absolves the other party from making tender or offer of performance (as in the case in a breach *after* time for performance), but waives performance itself and the necessity of averring and proving the ability to perform.

Thus, then, the decision of the Court below was based upon one proposition only: that the evidence failed to show that Gray was ever able or ready to convey to Mills the Market street lot. To this question, therefore, this brief will be particularly addressed; but we shall, nevertheless, feel constrained to notice some of the positions which were taken below by counsel for the defendants.

Specification of Errors.

Plaintiff has specified in his assignment of errors accompanying his petition for writ of error three errors which he complains of, which are as follows:

1. The Court erred in deciding that the plaintiff did not at any time have the means or ability to pay Joseph A. Donohoe, Sr., the purchase price demanded by him for the Market street lot.

2. The Court erred in giving judgment against the plaintiff and for the defendants for their costs, because Edgar Mills, having refused to take the title of the said Market street lot, and having given notice to plaintiff that because of such alleged defect in title he refused to carry out his contract for the purchase from the plaintiff of said Market street lot, became and was liable to the plaintiff for such breach of his contract without regard to plaintiff's ability to pay said Donohoe the purchase price demanded by him for said Market street lot.

3. The Court erred in giving judgment against the plaintiff and for defendants for their costs.

Brief of the Argument.

The plaintiff contends that there are three separate and distinct classes of "breach of contract," namely :

(*a*) A breach that is *forced* on one contracting party by the other.

(*b*) A breach by default that one party to the contract voluntarily incurs *after* time of performance has arrived.

(*c*) A breach by default that one party to a contract voluntarily incurs *before* time for performance has arrived.

Plaintiff further contends that in an action for damages for a breach of contract the question as to whether or no a plaintiff must prove his "ability to perform" is governed entirely by the further question : under which class (*a*, *b*, or *c*) does the breach fall ? And plaintiff further contends that case at bar falls under class *c*, and that he is under no obligation to prove that he was ready, able and willing to complete at the date of the breach, or that he could, but for the breach, have been ready, able and willing to perform his part of the agreement at some future day not then due for performance.

Although plaintiff contends that he is under no obligation to prove "ability," by reason of defendant's renunciation of contract *prior* to time for performance, yet as the question of plaintiff's "ability" was one of the main points of attack in the Court below it seems expedient to refer to it here. We propose to show therefore :

1. That if it could be shown that plaintiff's case came within the class of breach that called for proof of ability, then that he, in such a case, *did prove* his "ability" in the Court below to the same extent and in the like manner as in the several parallel cases reviewed below.

We next propose to show :

2. That under the facts of this case plaintiff is under no obligation to prove ability, and that if the question of ability be raised at all it must be raised by the defendant in his answer and amount to an allegation of fraud or *mala fides*.

I.

Gray's Ability to Perform.

The facts upon which this question arises may be thus briefly stated. Prior to the date of the written agreement between Gray and Mills, Cavanagh, who was interested with Gray in the transaction, had offered to Joseph A. Donohoe, the owner of the Market street lot, $160,000 for it. Donohoe declined to give an "option" on the property to Cavanagh, a stranger, but consented to accept Mills as Cavanagh's nominee, and executed, on October 7th, 1891, an instrument in writing agreeing to sell the lot to Mills for $165,000. Mills was duly informed of all the facts above detailed. Subsequently the abstract of title was delivered to Mills, was accepted by him and submitted to his attorneys. After some time and prior to November 18th, 1891, Mill's attorneys rejected the title, reported their rejection to Mills, and informed Gray that Mills had accordingly decided not to buy the lot.

Gray accepted this notice as conclusive, and in due time brought his action for damages occasioned by the breach.

The objection to the title was not properly taken, as it was "a good, marketable, sufficient and clear title deducible of record." (Findings, page 42, Transcript.) Upon the rejection of his title, Donohoe, on his own behalf only, tendered a deed to Mills and demanded payment, but Mills refused to accept the deed. A similar tender was made by Donohoe to Gray and also to Cavanagh.

Upon this state of facts it is evident that the responsibility for the failure of the transaction rested with Mills. If he had accepted the title as he should have done, Gray could, *without reference to his own or to Cavanagh's resources outside of the transaction itself*, have borrowed $45,000 upon the $115,000 worth of country land which he was to receive from Mills, and with the $120,000 to be paid him by Mills could have paid for and obtained Donohoe's deed to Mills, thus satisfying the contract. But the Court below was of the opinion that, as a basis for a recov-

ery, there should have existed in Gray an ability to perform quite independent of any resources which were to come to him from Mills, and that it was incumbent upon him, by positive proof, to establish the existence of such an ability in himself. In opposition to this view we shall contend that, even if it were necessary for the plaintiff to affirmatively establish an ability on his part to perform, such ability need not be independent of the transaction, but was sufficiently furnished by the circumstances of the transaction itself and existed potentially in the fact that the cash and property coming from Mills were more than sufficient to satisfy Donohoe and enable Gray to fulfill his obligation. And, further, upon a wider view, and with reference to broader principles of law applicable to the relations of the parties growing out of the facts, we shall contend that the conduct of Mills dispensed entirely with any necessity on Gray's part to have or to show any ability of performance whatever at the time of the breach of the contract by Mills or subsequently thereto.

The Doctrine of "Independent Ability."

That the ability to perform need not exist in either party at the time of entering into a contract is established by abundant authority. It is sufficient if the ability exists at the time of performance. As to contracts for the sale and purchase of land, it has been repeatedly held that the vendor need not have the title at the time of making the contract. As was said by the Supreme Court of California in Easton vs. Montgomery, 90 Cal., 315: "It is not necessary that the vendor should be the absolute owner of the property at the time he enters into an agreement of sale. An equitable title in land, or a right to become the owner of land, is as much the subject of sale as is the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, *either by the voluntary act of the parties holding the title*, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof."

And see Burke vs. Davies, 85 Cal., 114.
Anderson vs. Strassburger, 92 Cal., 40.
Joyce vs. Shafer, 97 Cal., 338.
Trask vs. Vinson, 20 Pick., 111.
Mitchell vs. Atten, 69 Tex., 70.
Pomeroy's Specific Performance, Secs. 341, 342.

Defendants have endeavored to make much of the circumstance that Gray obtained the contract from Donohoe as not running to himself, but as running to Mills direct. We fail to see how this affects the question one way or the other. Whatever Gray's equities and rights under that document, the fact that Donohoe agreed to convey to Mills at *Gray's request* surely was no barrier to Gray's fulfilling his obligation. (We may say parenthetically that we frequently omit mention of Cavanagh's name for the sake of brevity and to avoid confusion and unnecessary detail—Gray acquired Cavanagh's right by assignment, as is duly shown in the transcript, pages 31, 32.)

It must be remembered that at the date of the Donohoe agreement negotiations were not only in progress between Mills and Gray for the purchase of this property from Gray, but had so far progressed that Mills at that time had actually made Gray an open offer for a definite period not then due—an offer that only required Gray's acceptance to make a complete and binding contract. Mills surely then can have no reason to complain, or to assert that he was in any way hurt, or his rights or position in any way jeopardized or affected by Gray's obtaining a contract from Donohoe as running to Mills himself of land that was then the subject of his offer, and that it was Gray's intention then and there to convey or procure Donohoe to convey to Mills himself. The cases are clear that if Gray had obtained a contract from Donohoe running to a *stranger*, or if he had obtained a mere verbal agreement, not enforcible under the statute of frauds, or, indeed, if he held no agreement whatever, it would be sufficient, if at the time fixed for the performance he could procure the signature of the owner to a good and proper conveyance of the property to the purchaser.

For the purposes of the argument, therefore, of the point we are now discussing, we shall assume that the arrangement between Donohoe and Cavanagh, which resulted in the agreement to convey to Mills, as Cavanagh's nominee, was the equivalent of a contract in favor of Gray and gave Gray the right and power to produce a deed running to Mills in fulfillment of his contract. Viewed in this way, which is in accordance with the substance of the transaction rather than of its form, Gray was the equitable owner of the Market street lot, subject to an obligation to pay its purchase price, which was thus in the nature of an encumbrance to be removed by Gray before he could procure a deed and convey a good title to Mills. This encumbrance differed in no way from any other lien or charge upon the land of a vendor. And yet it has been held that in the case of a contract to convey land free from encumbrances, if the consideration money exceeds the amount of the encumbrances on the land, the vendor, in suing for a breach, need not prove that without the purchase price he had an independent ability to pay off the encumbrances.

In such a case it is quite sufficient for him to show that the purchase price would have cleared the land of its liens.

Rhorer vs. Bila, 83 Cal., 51.
Irvin vs. Bleakley, 67 Pa. St., 29.

The vendor of land encumbered by a mortgage presently payable fulfills his obligations under the contract of sale if he tenders his deed, at the same time offering to obtain a release with the purchase price, and no Court would permit the vendee to evade his contract where the purchase price was more than sufficient to pay off the mortgage and the vendor offered to make such payment contemporaneously with the payment of the price and delivery of the deed.

Webster vs. Kings County Trust Co., 80 Hun., 420.

There can be no difference in this respect between a sum necessary to pay off an incumbrance and a sum necessary to obtain the title from the owner, and if in the latter case the vendor tenders his own deed, at the same time offering to apply the purchase money to the payment of the owner

and the procuring of the title, the vendee can raise no objection, especially if he has known throughout the transaction that this was to be the course of the business, and has made no protest.

This was probably the position taken by the Court below as to the $120,000 payable by Mills to Gray. If that sum had been sufficient to obtain Donohoe's deed, we think the Court would have had no difficulty in finding an ability in Gray to perform. It is only as to the excess of $45,000 that the Court was unable to find any ability of payment in Gray.

But if the principle be once admitted, and we see no escape from it, that the ability to perform need not always reside in each party, independently of the other, or independently of the transaction itself, and that it may be drawn from the consideration which is to be paid by one party to the other, it would seem unreasonable to confine the principle to those cases only where the consideration which is to enable one party to perform is a money payment, and to refuse to apply it to those cases where the consideration is property having a money value and an equal capacity with money to furnish ability of performance.

In this case land valued at $115,000 was, as a part of the transaction, to be conveyed to Gray. Why should the Court have shut its eyes to the obvious fact that with this land Gray could readily have obtained the excess wherewith to pay Donohoe? Why should the judicial mind refuse to recognize a conclusion so clearly and irresistibly to be deduced from all the evidence?

We maintain with confidence, and will presently show, that it does not rest with us to prove that Gray had the financial ability to perform, but if it did, we contend that a sufficient ability in Gray to perform his part of the contract grew out of the very facts of the transaction, and was proved to a moral certainty by the evidence. This we claim is the only practical, business-like view which can be taken of the matter. We *know* that Gray was able to perform, because we know that the consideration to be paid by Mills would

have given him that ability, if he did not already possess independent ability of his own.

There was no purchase money payable by Gray to Mills, or to be tendered, therefore, under any circumstances or at any time by Gray to Mills, and his ability to clear the Donohoe title of the "equitable mortgage" (or "incumbrance" of .$165,000 or $45,000, as the case may be) was at least shown in the same way, and *to the same extent* as in Carpenter vs. Holcomb, 105 Mass., 285; Smith vs. Lewis, 24 Conn., 624; Howland vs. Leach, 11 Pick., 155, and numerous other cases that might be quoted did necessity demand.

If Gray had proved at the trial that he was possessed of his *own* "independent" property to the value of $115,000, would it have been necessary for him further to prove that he had actually raised the $45,000 thereon, and have put it in his pocket or his bank before bringing suit? Unquestionably the principle would have been allowed, as in the cases above mentioned, that in showing that he had property valued at $115,000, whereon he could raise $45,000, he had shown sufficient presumptive evidence of his ability to "*procure a release*," and that there was no necessity to disturb his investments, to encumber his estate or to do any other act for the mere purpose of performing a "useless ceremony" or preparing for actual performance after notice from defendant that he would not perform. Wherein lies the difference, in effect or in essence, between a vendor who has *property of his own* whereon he could raise sufficient money to clear incumbrances, and *excess of property coming to him on completion* whereon he could raise the same money and give a clear title on completion?

That an independent ability need not reside in each party to a contract is manifest in the class of cases where the means of performance are almost necessarily furnished by one party to the other. In large manufacturing contracts, or contracts for the performance of work, where one party agrees to pay in installments as the manufactured product is delivered, or as the work progresses, the ability of the manufacturer to produce, or of the contractor to go on with the work, nearly always depends upon the payments to be

made during the performance of the contract. Would it be a good defense to a suit by a manufacturer, or a contractor, that he had no ability to perform independent of the means which were to be furnished him by the defendant?

There is another answer to be given to the special reason inducing the decision of the lower Court in this action. Equitably, the country lands belonged to Gray, subject only to his obligation to pay for them. Mills was his trustee. They were part of Gray's assets and estate, and as such, of themselves, vested in him an actual ability to pay for and procure Donohoe's title.

And it is further to be considered that, even when ability of performance must be shown, the term does not necessarily imply actual and completed preparation, but rather the possibility of getting ready within the proper time and under the proper circumstances. *Readiness includes ability, but ability does not include readiness.* And while a man must, in some cases, show that he was able, it does not follow that he must show that he was ready.

This was made very clear in Smith vs. Lewis, 24 Conn., 624, where this language was used by the Court:

"It is not claimed that a tender of performance is necessary to entitle the plaintiff to a recovery; that was physically impracticable. But it is justly said that the proof will show that the plaintiff was 'ready and willing' to perform; and the disposition and ability being proved, the only remaining objection relates to the degree of preparation. The plaintiff had not his money in his formal possession; he had not cleared his own estate of incumbrances, and had not prepared the title deeds of his property; all these preparations he had suspended in view of his arrangement to meet the defendant, *at which he expected some facilities to be furnished by the defendant*, not necessary but convenient to himself; but all which preparations he was able to complete, and would have completed if the defendant had not by his absence, under the peculiar circumstances of the case, induced him to desist. By yielding to this inducement, it is said, he has defeated his own right to a recovery. The argument is that, although the plaintiff was naturally

and rightfully convinced by the unexplained and evidently contrived absence of the other contracting party, that the latter was determined to break the contract, and was thereby dissuaded from the nugatory and superfluous acts of taking his money into his manual possession, of procuring the release of mortgages and actually drafting and acquiring conveyance of his own real estate, he thereby fell short of his duty ; that *there is a legal and arbitrary standard of readiness*, which is not to be affected by the absence of the other party ; that the legal effect of absence is limited to the mere excuse of the tender of performance ; that in cases like the present the act of a party will not, *as his declaration would*, justify the other in attaching to it an ordinary and natural import ; that the act of absence, no matter what its attendant circumstances or how clearly it reveals a fraudulent intent to violate a contract, has a limited and arbitrary legal effect ; and that a party who by such conduct actually causes another, not unreasonably, *to suspend the further performance of his contract can take advantage of his own wrong* and set up the defect of performance as a breach of legal duty ; that the party claiming to be excused must show that he is excused by the law, and not by the other contracting party ; as if there were any legal duty under a contract, which the parties may not dispense with by their own voluntary acts.

" Notwithstanding some confusion in the decisions, arising from the endeavor of Courts to apply, in this class of controversies, the principles of common reason and justice to the particular case, we have been unable to find that any such legal and arbitrary standard of readiness exists as is thus suggested, or that there is any prescribed legal effect to the willful absence of a contracting party from the place of performance, or that the extent of the necessary preparation may not vary with circumstances and the attitude of the other party, or that a refusal will only excuse from such covenant duties as it may render impossible to perform. On the contrary, we think it to be a demand of *justice that a willful refusal*, with which a willful absence is conceded to be identical, will excuse the performance of

all acts, including formal acts of preparation, of which the refusal fairly imports a renunciation and disavows the acceptance ; in other words, of all acts, of the failure to do which the premeditated conduct of the other party is, in a just and reasonable sense, the direct and undeniable cause."

In Carpenter vs. Holcomb, 105 Mass., 285, a similar state of facts was treated in the same way.

" The defendant insists that the plaintiff fails to show a readiness to perform, at the time of her offer, because the mortgage was not discharged. But readiness, within the meaning of the rule, does not require full and complete preparation at the moment when the offer is made. It is not necessary that the plaintiff should come with the deed and discharge of the mortgage duly signed, sealed, stamped and ready for delivery, and with release of dower, when the contract requires such release. It is enough, where there is an *unqualified refusal* of the defendant shown, if the plaintiff has the *ability to procure* a discharge and give a good title. There was evidence here, taken in connection with the known and usual mode of transacting such business, *the defendant's knowledge of the existence of the mortgage, its comparatively small amount*, and the fact that both parties recognized that it was then due, which would justify the jury in finding that the defendant refused to accept performance, and waived his right to require performance. The defendant's refusal to take a deed was unqualified and *absolute, not founded upon the existence of the incumbrance, or a doubt of the plaintiff's ability to remove it if necessary.* The circumstances attending the refusal, and the terms in which it was expressed, were such as to justify the jury in inferring that to procure a discharge of the mortgage, and make further proffer of it, would be but an idle ceremony, which it was intended to dispense with, thus leaving the defendant wholly at fault in not completing the contract."

The application of these cases to the case at bar is obvious.

The nature of Gray's connection with Donohoe's title was

known to Mills from the outset, and not objected to; that, in the language of Smith vs. Lewis, "he expected some facilities to be furnished by" Mills, was understood and apparent; Mills broke away from the contract on the ground of defect of title, and for no other reason; and it was evident that it would have been useless for Gray to realize on other securities or sell other property in order to receive $165,000 with which to get Donohoe's deed, and put himself in a condition of actual preparation.

II.

A voluntary refusal by one party to a contract to be bound by the contract, made before time for completion has arrived, is equivalent to performance by the other party, and excuses him from showing or having ability to perform.

This is a concise statement of a principle of law, clearly established by the authorities, growing out of the very nature of the contractual relation, explanatory of the apparent confusion between some of the cases touching the effect of a breach of contract upon the question of mutual ability, and affording a broader basis than the considerations which have preceded for the position of the plaintiff in this action.

The general features of the relations of vendor and vendee in contracts for the sale and purchase of land, as far as concerns the matter of tender, breach, ability to perform, and waiver of any or all of these, may be stated in this way:

The obligations of the buyer to pay and of the seller to convey are mutual, dependent and concurrent; neither party can sue until the other is in default; neither can put the other in default until time for performance has arrived, and then only by a tender of performance on his own part; and no such tender is good unless an ability and readiness to perform actually subsist in the party making the tender.

As to the concurrent nature of the conditions and the necessity for tender to put a party in default, see:

Englander vs. Rogers, 41 Cal., 422.
Neis vs. Yocum, 9 Sawy., 24.
Dunham vs. Mann, 4 Seld., 513.
A. & E. Encyc. Law, Vol. 3, p. 910.
Barron vs. Frink, 30 Cal., 488.

And that a tender of performance to put a party in default must be in good faith, having behind it ability and readiness, see :

Champion vs. Joslyn, 44 N. Y., 658.
Cal. C. C., Sections 1439, 1493, 1495.

This is the law when one party seeks to put the other in default. Tender of performance is obligatory, and there can be no valid tender of performance where ability to perform is wanting. Proof of such ability is therefore essential.

But when a party to the contract puts himself in default by his own act or announcement, as by a voluntary refusal to perform, a different condition of things arises.

Superficially it would almost appear that a different doctrine was applied to the case of a breach *before*, to that of a breach *after* time of performance ; or that a distinction was drawn between the case where "one party would put the other in default" and the case of a "voluntary refusal," but a more careful study of the cases will show that the doctrine applied is the same in all cases. It of necessity operates differently—that is all.

The rule, in such case, is that the voluntary refusal of the party excuses all *future* acts to be done by the other party, but does not excuse his *past* delinquency. The contractual relation is, by the voluntary breach, *eo instanti*, dissolved and cut off. Each party must thenceforth stand as to his rights and duties under the contract precisely where he stands at the moment of the breach. As the tree falls, so shall it lie. The party not guilty of the breach is given an immediate right of action for the breach, and in his action he must show that he was not in default of any of his obligations up to the time of the breach, but he need not show any performance of or ability or readiness to perform any of his obligations not existing at the time of the breach, but which

would have rested upon him at a time subsequent to the breach if the breach had not occurred.

The innocent party is "entitled to have the contract kept "open as a subsisting and effective contract, its unimpaired "and unimpeached efficacy might not only be essential to "his 'interests,' but of the very essence of his capacity for "performing his obligations under the contract."

Frost vs. Knight, L. R. 5 Exch., 322.

From all such subsequent obligations he is excused. The breach is equivalent to their performance. He need only show that he himself was not in default at the time of the breach (Cal. C. C., Section 1440); as a matter of course he could not be in default as to obligations or conditions not then due or incumbent upon him.

In a case of voluntary renunciation it becomes necessary, therefore, to inquire what obligations and conditions were, at the moment of the breach, due and incumbent upon the other party, and this must obviously depend upon the *time* of the renunciation, whether it was before or after the time of performance of the contract. If the renunciation occur when or after performance has become due, both parties must be ready and able to perform all the conditions; if any party is not able and ready to perform, he is in default and cannot avail himself of a breach by the other. But if the renunciation occur before the time of performance has arrived, and we shall claim that that was the case here, it occurs at a time when, as we have seen, neither party need be ready or able, and therefore the party suing for the breach need not show that he was then ready or able to perform, or that he ever could have been ready or able to perform. We shall proceed to show that this distinction is amply supported by authority, and is not denied or shaken by any of the cases cited in the Court below by defendants' counsel; moreover, that, in the light of this distinction, all of the cases are harmonized, and the language which, in some of them, when taken by itself, would seem to militate against the views here contended for, is explained and limited so as to confirm the accuracy of the above statement of

the law. In other words, we shall show that in every case the *decision* has been in strict accordance with the distinctions above alluded to.

The position here taken by us was well illustrated in Lovelock vs. Franklyn, 8 Q. B., 371. The suit was upon a contract made by the defendant for the assignment to the plaintiff of a leasehold interest in land upon payment by plaintiff at any time within seven years. Defendant assigned his interest to a stranger. The declaration failed to aver plaintiff's readiness to accept an assignment, and, on demurrer, it was urged (p. 374) that the declaration was bad, because it did not appear therefrom that the plaintiff had the means of purchasing the assignment. "At least," said defendant's counsel, "he should have averred that he would have been ready at some time in the seven years." "(Patterson, J. Must a man say, I now undertake to be ready six years hence? He might die in the interval.") "He ought to show his ability," was the answer of counsel. "Ability at what time?" asked the Court. "At the time of the breach," said counsel. "*Ability at that time is not essential to the maintenance of the action*," was the final reply of the Court, and the demurrer was overruled.

And so, in Parker vs. Pettit, 43 N. J. L., 517, the Court said: "Where the vendor, before the time for the performance of his contract of sale, has disabled himself from performing his contract, neither a demand of performance, nor a tender of the consideration money, nor an averment of the plaintiff's readiness to accept the goods and pay for them, is necessary."

And in Howard vs. Daly, 61 N. Y., 374, the Court distinctly held it to be "a well settled rule that if a person enters into a contract for service, to commence at a future day, and before that day arrives does an act inconsistent with the continuance of the contract, an action may be immediately brought by the other party; and, *of course*, without averring performance or readiness to perform."

Crist vs. Armour, 34 Barb., 378, likewise recognized the very distinctions upon which we are insisting. After admitting that in a contract of sale the obligations of the par-

ties are concurrent, and that neither can put the other in default without performance or readiness to perform on his part, the Court held (pp. 386, 387) that, where one party committed a breach by putting it out of his power to perform, before the time of performance, the other was excused from averring or proving a readiness to perform on his own part.

In North vs. Pepper, 21 Wend., 638, the declaration averred that the plaintiff's intestate agreed to sell a farm to the defendant on May 1st; that in January the defendant gave notice to the vendor that he had made up his mind not to take his farm; and that defendant had ever since failed to perform his agreement. There was no allegation of readiness or ability on the part of plaintiffs or their intestate. Objection was made on demurrer to the absence of this allegation. Held, that upon well settled rules of pleading the refusal by the vendee before the time of performance dispensed with an offer or readiness on the part of the vendor, and that the pleading was good.

So in Traver vs. Halsted, 23 Wend., 70, it was held that a similar refusal by the vendee before the day of performance, but withdrawn by the day, would have operated as an excuse for the vendor not to be ready and would have discharged the vendor altogether.

The case of Grandy vs. Small, 5 Jones, N. C., 50, expressly recognizes that in the event of a voluntary refusal by the vendee readiness or ability in the vendor is excused.

"In some cases," said the Court, "not merely the offer, but the readiness and ability, are dispensed with, and the action may be maintained without the proof of either. * * * The principle is this: If a party to an executory contract make a performance impossible, or request the other party not to hold himself in readiness, which is acted on, and thereby he is prevented from being ready and able at the day, he may maintain an action without proof of readiness, ability or an offer."

To the same effect is Clarke vs. Crandall, 27 Barb., 78, where the Court, after citing Traver vs. Halsted, said:

"The cases all speak one language, and are substantial

applications of the rule that where the non-performance of a condition precedent is occasioned by the act of a party, either disqualifying himself for performing on his part, *or by his giving notice that he will not perform*, the party seeking his remedy is not bound to aver performance or readiness to perform."

"It is unnecessary to allege performance, or readiness to perform, on the part of the plaintiff, where it is shown that the defendant has repudiated the contract, or affirmatively refused to perform, or denies liability under it."

Riley vs. Walker, 6 Ind. App. Ct. Rep., 629.

In the decisions we have cited there is frequent reference to the leading cases of Hochster vs. De la Tour, 2 El is & Bl., 678 ; Cort vs. Ambergate, 17 A. & E., 127 ; Frost vs. Knight, L. R. 7 Ex., 111, and other cases of the same complexion, through all of which runs the principle that when one party to a contract, before the time of performance has arrived, voluntarily commits a breach by announcing that he will not perform or by putting performance out of his power, the voluntary breach is the equivalent of full execution and of the performance of all conditions by the other party, so wholly and absolutely that the other party may sue at once for the breach without waiting for the time of performance to arrive, and may, without affecting his right of action, *proceed to disable himself* from performance on his own part : the manufacturer, by ceasing to make the product called for by the contract ; the employee, by accepting another engagement ; the one under contract to marry, by marrying another. The cases of this class are all exemplifications of the rule that voluntary breach, before performance is due, excuses not only performance but ability to perform, and, in this sense and to this extent, is the complete and absolute equivalent of performance.

This should be enough in support of our contention that whatever may be the rule as to the necessity of a proof of ability in order to support a tender or offer made to put a party in default, or where either party defaults after performance has become due by both, a refusal by one party,

before performance is due by either, gives an immediate right of action to the other, which can be enforced without proof of ability on his part, for the reason that he is not bound to have ability at the time the breach occurs.

We shall proceed to show that the cases cited in the Court below to maintain a contrary doctrine are only illustrations of our position. These are :

Nelson vs. Plimpton, 55 N. Y., 480.

The defendant had agreed to store 500,000 bushels of grain for the plaintiffs. Plaintiffs sold to Lincoln & Co. their right under this agreement to the extent of 100,000 bushels, and gave to Lincoln & Co. an order on defendant to store 100,000 bushels. The order being presented to the defendant, and demand being made by Lincoln & Co. for the storage of 100,000 bushels, defendant refused. Lincoln & Co. assigned to plaintiffs their claim for damages for the refusal. The Court held that the defendant was not required by the terms of the contract to accept the order, and that the refusal did not constitute a breach. This was determinative of the whole case, and whatever else was said by the Court as to default and tender and readiness was dictum. But, even if this were not so, the case was one where it was sought to put the defendant in default by a demand. Under the rule above explained, therefore, the demand should have been based upon ability in plaintiffs or their assignee to produce the grain for storage. But it was found that neither plaintiffs nor Lincoln & Co. had grain to store. The demand on the defendant, therefore, was not *bona fide* or effectual, and did not put the defendant in default. What was said by the Court therefore, at the opening of the opinion, although not necessary to the decision, was but an expression of the law, as we have above stated it, touching the necessity of ability behind an offer of performance to put a party in default.

Bigler vs. Morgan, 77 N. Y., 312, was a case of a failure of a party to perform, performance being due by both parties. It was held, in accordance with the rule above stated,

that the other party could not recover damages without showing that he himself was not in default and that he had the ability to perform on his part.

In Lawrence vs. Miller, 86 N. Y., 131, we have the case of a vendee, who had made a partial payment and defaulted in the balance of the purchase price, seeking to recover what he had paid. He was in default himself, had never put the vendor in default by tender, and the vendor had never refused to convey. The judgment for the defendant under the circumstances cannot give much aid to the defendants in this action or shake the correctness of the rules of law on which we rely.

Eddy vs. Davis, 116 N. Y., 247, is of the same complexion as Nelson vs. Plimpton, and illustrates the rule that a tender to put a party in default must be accompanied by ability in the party making the tender—the plaintiffs having called upon the defendant to pay at a time when they themselves were without title.

Grandy vs. McCleese, 2 Jones, N. C., 142, is to the same effect, and simply holds that a vendor of corn could not be put in default without a demand backed by readiness and ability to pay.

And Brown vs. Davis, 138 Mass., 458, merely holds that an offer on the part of the vendee was necessary to put the vendor in default.

That Mills' breach of contract occurred prior to the time when completion and performance were due, and at a time when it was not yet necessary for Gray to have ability to perform, is clear. The contract between Mills and Gray was silent as to the time of performance. Performance, on either side, therefore, was not due until a reasonable time after notice by one to the other that he was ready to perform. To this condition of things the language of the Supreme Court of this State in the similar case of Anderson vs. Strassburger, 92 Cal., 40, is singularly applicable.

It was a case in which the defendant had agreed to convey land of which he was not the owner, but which the owner had agreed to sell to him. "The title," said the

Court, speaking through Judge DeHaven, "was at all times potentially in the defendant, and he was not in default simply because no formal conveyance was made to him by his grantor within the time allowed by plaintiff for examination of the title, nor was there any necessity for him to acquire such title in order to carry out his agreement until plaintiff notified him that he was ready to complete the contract upon his part. The plaintiff was allowed ten days within which to examine the title, and the agreement, in view of all the facts surrounding the parties at the time it was made, contemplated that defendant should receive notice of the approval of the title he was to obtain from Lees, or, if not approved as satisfactory, that he should be informed of any objection which after such examination plaintiff might have to the same, and he was entitled to a reasonable time thereafter within which to perfect his title or remedy any defects discovered by plaintiff, and not until plaintiff gave such notice and offered to fully perform the contract on his part upon receiving a perfect title, and the refusal thereafter of defendant to convey in accordance with the terms of his agreement, would plaintiff have the right to rescind the agreement and recover the amount paid by him thereon."

Thus we see that performance on Gray's part was not due until he was called on by Mills to perform. Mills never made any such demand, but, on the contrary, without making it, and, consequently, before performance was due, repudiated the contract and relieved Gray from going on with it.

We think it should be obvious from the foregoing discussion that the plaintiff's ability to perform in a suit for breach of contract is part of his case, to be affirmatively pleaded and proved by him only where, performance being due, he has sought by a tender or offer of performance to put the defendant in default, or where performance being due, the defendant has put himself in default. If, in cases not coming within these two categories, the defendant should question the plaintiff's ability, it must be by way of special defense, to be affirmatively pleaded and proved by

the defendant, and going to the plaintiff's good faith in entering into the contract at all.

"If," said the Supreme Court of California in Easton vs. Montgomery, 90 Cal., 315, "the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld." But of Gray's good faith in this transaction there can be no doubt. It was not until he had obtained the refusal of Donohoe's land that he accepted Mills' offer. His contract with Mills was based upon the control which he had obtained over the Market street lot.

But further, if the defendants desired to impeach Gray's ability to perform, they should have done so by affirmative proof. This was the view taken by the House of Lords in Mackay vs. Dick (6 App. Cases, 251), as also by the New York Court of Appeals in Stokes vs. Mackay, 147 N. Y., 223. It was contended there that, although a waiver of a tender of certain b nds had been established, "it was incumbent upon Stokes affirmatively to establish the fact that he was in a position to redeem the bonds and able actually to deliver them to Mackay" (p. 231). But the Court held (p. 233) that "the plaintiff was not called upon to establish the fact that had the defendants not waived a tender and a tender had been necessary, he possessed ways and means to produce and present the bonds for acceptance or refusal. Whatever was the real condition of his finances, there was nothing to warrant the inference of an inability to redeem the bonds, and, if presumptions were to be indulged in, the presumption of plaintiff's ability to perform his agreement and to have the means to do so obtained, until overcome by evidence to the contrary. It is very clear, under the circumstances disclosed, if at all essential, that it was incumbent upon the defendants to make out the fact, which they wholly failed to establish, that the plaintiff was incapable of redeeming the bonds for delivery."

The treatment of the case by the New York Court is in strong contrast to the method pursued by the Court below

in this case, in which, without any proof whatever upon the subject, the Court simply presumed that neither Cavanagh nor Gray could have purchased Donohoe's title, and found affirmatively upon a point of fact which should have been affirmatively proved by the defendants, and as to which they gave no evidence whatever.

The case went off upon a mere presumption without proof as to a point upon which the presumptions were with the plaintiff and the burden of proof on the defendants.

III.

As to Some Minor Points.

It remains only to consider several minor points, which were made by the defendants in the Court below and may be renewed here.

(*a*) It was contended that Cavanagh and Gray never obtained an option on the Market street lot. That, on the contrary, Donohoe's son, acting for his father, refused to deal with Cavanagh, and only dealt with Mills.

But it plainly enough appears from the record (pp. 34 and 45) that Donohoe's refusal was only to give Cavanagh a writing with which he might go on the street and hawk his property about, and, asking the name of the proposed purchaser, and hearing that it was Mills, consented *at Cavanagh's request* to convey the property to Mills, as Cavanagh's nominee. The point is immaterial and does not affect the essence of the transaction, as we shall proceed to explain.

(*b*) It was contended that Gray never had an option on the lot or the ability to demand a conveyance because the option ran in favor of Mills, and not in favor of himself or Cavanagh.

But this is to regard the form rather than the substance, and to ignore the essential character of the transaction. Cavanagh and Gray accepted an option running to Mills because this, by a short cut, effected the object they had in view, which was to bring the title within Mills' reach. Mills knew of the shape which the business had taken,

made no complaint, submitted the abstract to his lawyer, "accepted the benefit of the transaction," and so "consented to all the obligations arising from it" (Cal. Civil Code, Sec. 1589), and was estopped from any defenses growing out of the form of the transaction. If Donohoe had refused to convey, Mills would have had a cause of action against Gray for breach of contract. If Mills had accepted Donohoe's deed, he would have been bound to convey his country lands to Gray upon the payment by Gray to him of the excess of Donohoe's price over the sum payable by Mills to Gray. Mills and Donohoe could not have ignored Gray, and, by dealing with each other behind his back, have deprived him of the benefits of the contract between himself and Mills. Mills had to accept the deed from Donohoe to himself in satisfaction of Gray's obligation to him, or not at all. The option in favor of Mills was therefore the *mode* selected by Gray for performing his contract with Mills, was tacitly accepted by Mills himself, and cannot now be made, by his representatives, an excuse for a failure by Mills to perform his part of the agreement.

It was in Mills' power at any time to bind Donohoe, and get the title by accepting Donohoe's offer, and the duty to do this was one which grew out of the circumstances and was assumed by him.

He was not in a position where he could avail himself of the transaction by exercising the option, or not, just as he pleased, arbitrarily and according to his own ideas of profit or loss to himself. He was obligated, upon Gray's demand, to accept the option and call for the deed.

Moreover, it was immaterial to the issue whether Gray, Cavanagh or Mills could or could not *compel* Donohoe to give effect to his agreement. If from the voluntary act of Donohoe, or otherwise, Gray was in a position to perform at the proper time of performance, this was sufficient. That Donohoe up to the last was ready and willing to give effect to Gray's contract is shown from the fact that after the date of the breach Donohoe voluntarily tendered a deed to Mr. Mills, as also to Cavanagh and as also to Gray.

(c) It was contended that Mills was not obliged to accept a deed from any one but Gray.

This contention finds no support in the authorities.

The question arose in Royal vs. Dennison, 109 Cal., 563, where it was held that if a vendee of land intends to object to a deed from a stranger to himself, he must do so at the time of its tender, that is, when he becomes aware that the vendor is going to make title in that way. Otherwise he will be taken to have waived the objection. This depends upon the same principle as the rule that the vendee is limited, in an action to recover the purchase money, to such defects as he pointed out on the rejection of the title.

Easton vs. Montgomery, 90 Cal., 313.

So in Murrell vs. Goodyear, 1 De Gex F. & J., 448, the Court held that the purchaser, becoming aware that the seller did not have at the time of making the contract a title to the whole fee, but was expecting to get a part of it from another, was bound to make the objection at once.

"But, I say," said Lord Justice Turner, "without any hesitation, that if a purchaser has any such right as has been contended for and insisted upon on the part of this defendant, it is a right he is bound to insist upon at the first moment; he cannot play fast and loose, and say, 'I treat this as a subsisting contract,' and then afterwards suddenly turn round and say, 'I have a right to revert to my original position. I have a right to destroy that contract, which for months and months during the whole treaty of negotiations upon the title I have treated as a subsisting contract.'"

The language as well as the principle is singularly applicable to this case. The title was rejected by Mills' attorneys for reasons other than the fact that it was not to come through Gray himself. Mills' representatives are therefore to be confined to the objection made at the time of the rejection. But, far beyond this, when Mills learned that the title was to come direct to himself from Donohoe, and not from or through Gray, that was the time for him to make any objection he had on that score, or even, if he pleased,

to rescind the agreement. Instead of that, he accepted, adopted, stood to profit by the situation which Gray had created. He could not have played fast and loose, nor can his representatives now be permitted to take a position which he could not, and, as we believe, he would not have taken. Having treated Gray as the owner of the property, having continued to deal with him after learning that he was not the owner, after submitting the title to the opinion of his attorney, after retiring from the transaction solely on the ground that the title was not good, every principle of fairness, every principle of law touching the relations of vendor and purchaser, under such circumstances, forbids the plaintiff to be now turned away for reasons which were ignored and waived by the parties, and requires that the case shall stand or fall upon the rightness of the reason which induced one of them to withdraw. Every other question is an afterthought, and foreign to the real merits.

Upon the trial in the Court below counsel for the defendants affected to treat this case with some scorn. Gray and Cavanagh were held up to the Court as penniless adventurers, who laid a scheme for the entrapment of Mills by which, without embarking any means of their own, they might profit in trading upon the capital of Mills and Donohoe. The suit itself was stigmatized by one of defendants' counsel as a raid on a dead man's estate.

The plaintiff's case was certainly presented under many disadvantages. Mills, Donohoe, Cavanagh, Jarboe, all actors in the drama, had passed from the scene before the trial ; the lips of the plaintiff were sealed by Subdivision 3, of Section 1880, of the California Code of Civil Procedure, and the proof was mainly restricted to documents bearing upon the transaction. And yet, even from this meagre evidence, as we most earnestly and seriously contend, enough appears to fully make out a case which on its merits is entitled to the respectful consideration of any Court.

The criticism that Gray and Cavanagh did not invest their own means in the arrangement with Mills and Donohoe is one which would apply to every negotiation in which

men make money by the use of skill, knowledge of the markets, or study of the wishes or necessities of others, rather than by the actual investment of capital. It is answered by the language of the Court in Trask vs. Vinson, 20 Pick., 105 : " We know of no rule of law or principle of sound policy which prohibits a person from agreeing or covenanting to convey an estate not his own. He might have authority from the owner to sell, or he might have the refusal of the estate, or he might rely upon his ability to purchase it in season to execute his contract."

Gray and Cavanagh simply knew that Donohoe was willing to sell his city property and that Mills wished to get rid of his country lands. Instead of bringing the two men together and, by acting as mere brokers earning a mere commission, they preferred to be principals themselves in the transaction, and, by assuming the risks, to run the chance of making the profit growing out of the divergence of views between Mills and Donohoe as to the values of their respective properties. In this way the wishes of both Mills and Donohoe were met. If the transaction had been carried out Donohoe would have got his price in cash for his lot. Mills would have been relieved of his country lands and would have invested his money in city property. Without the intervention of Cavanagh and Gray it is by no means sure that this result could have been attained. It is not certain that Donohoe would have taken $120,000 in cash and the country lands for his lot, or that Mills would have given $165,000 in cash for it. But Cavanagh and Gray were willing to take the risks and to stand in the breach. If the business had been done they would have obligated themselves personally to the extent of $45,000 and have assumed the burden of carrying the country lands, and to this extent they would have been and were principals, contributing to the transaction their individual liability, as well as their knowledge of the values of real estate.

The insinuation that they in the least degree misled either Mills or Donohoe must fall to the ground for want of any foundation in fact. The disclosure to both of them of

the real nature of the negotiation was complete, and both of them fully accepted all its terms without complaint.

We submit with great confidence to this Court that, so far from the transaction or this suit being of a questionable nature, the record discloses a perfectly proper and business-like affair, conducted on Gray's part with the utmost frankness, by which all parties would have been benefited, and which failed through no fault of his. An unwarranted and unfounded rejection of title, for which Mr. Mills and his attorneys were responsible, prevented the execution of the arrangement and caused a large loss to Gray, which should be made good to him by Mills' estate. The attempt of defendants' counsel, by baseless suggestions of impropriety in Gray's conduct, to divert the attention of the Court from the injury done to Gray through Mills' unexcused breach of contract, must be as useless as it is unfair.

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